Litigation Section of The State Bar of California

Litigation Update

Litigation Section News

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Attorney fees awarded after service quashed. In *Profit Concepts Management, Inc. v. Griffith* (Cal. App. Fourth District, Div. 3; May 5, 2008) 162 Cal.App.4th 950, [76 Cal.Rptr.3d 396, 2008 DJDAR 6555], a former employer sued its former employee, an Oklahoma resident. The defendant, employee, successfully moved to quash service for lack of personal jurisdiction. The employment contract, under which he had been sued, provided for attorney fees to be paid to the prevailing party. Since defendant prevailed in the action, he was entitled to attorney fees.

No jury trial in action to abate public nuisance. Whether a party is entitled to a jury trial is determined by whether the cause of action existed at common law in 1850, when the California Constitution was adopted. There was no action at common law for the abatement of a public nuisance. Therefore, defendant, operators of a motel, where multiple arrests had been made for prostitution, were not entitled to a jury trial in the action to abate the nuisance. *People v. Bhakta* (Cal. App. Second Dist., Div. 8; May 6, 2008) 162 Cal.App.4th 973, [76 Cal.Rptr.3d 421, 2008 DJDAR 6590].

Non-noticing party is entitled to deposition transcript at reasonable cost. Where the party noticing the deposition requests and agrees to pay for expedited preparation of the transcript, non-noticing parties do not have to pay the excessive fees for their copy. The trial court has authority to determine the amount of a reasonable fee for the transcript copy. *Serrano v. Stefan Merli Plastering Co., Inc.* (Cal. App. Second Dist., Div. 3; May 7, 2008) 162 Cal.App.4th 1014, [76 Cal.Rptr.3d 559, 2008 DJDAR 6613].

Contract interpretation is for the court, not the jury. In *Wolf v. Walt Disney Pictures and Television* (Cal. App. Second Dist., Div. 7; May 9, 2008) 162 Cal.App.4th 1107, [76 Cal.Rptr.3d 585, 2008 DJDAR 6742], (As Mod. June 4, 2008), the trial court, over Disney's objection, asked the jury to interpret the term "purchaser" in an action for royalties. The Court of Appeal reversed. In the absence of conflicting evidence, contract interpretation is a matter of law to be determined by the judge and not by the jury. The jury incorrectly interpreted the word "purchaser" to include Disney subsidiaries.

Bubble gum, anyone? Those baseball fans who gave up chewing tobacco for bubble gum should realize that not all "Bazooka Bubble Gum" comes from the same source. If you need to know more, read *The Topps Co., Inc. v. Cadbury Stani S.A.I.C.* (2nd Cir.; May 15, 2008) 526 F.3d 63, [2008 WL 2051964].

Equitable putative spouse doctrine applied to domestic partnerships. Under the equitable putative spouse doctrine, persons who have a reasonable, good faith belief that their marriage is valid, have all the rights of a spouse, even if the marriage is not legally valid. Under the *California Domestic Partner Rights and Responsibilities Act* of 2003 (Stats. 2003, ch. 421, encoded in various code provisions, including Fam. Code §297.5), registered domestic partners have the same rights and are subject to the same responsibilities as married couples.

Velez v. Smith (2006) 142 Cal.App.4th 1154, [48 Cal.Rptr.3d 642] holds that, absent compliance with the state registration procedures provided for in the act, domestic partners cannot claim rights under the act. But, *In re Domestic Partnership of Ellis & Arriaga* (Cal. App. Fourth Dist., Div. 3; May 6, 2008) 162 Cal.App.4th 1000, [76 Cal.Rptr.3d 401, 2008 DJDAR 6565], holds that if a domestic partner can prove a reasonable, good faith belief that the relationship was registered, the equitable putative spouse doctrine applies. In Ellis, the partners completed the necessary documentation for registration but, allegedly, the partner charged with filing the documents failed to do so and also failed to tell his partner of the omission.

Piercing corporate veil only runs in one direction. Under the alter ego doctrine, an individual owner of a corporation may be liable to corporate creditors if they can "pierce the corporate veil." (See, *Hanning, Flahavan & Kelly, California Practice Guide, Personal Injury* (The Rutter Group), Chapter 2, §§2:550 ff.) But, the reverse does not apply. *Postal Instant Press Inc. v. Kaswa Corp.* (Cal. App. Fourth Dist., Div. 3; May 20, 2008) 162 Cal.App.4th 1510, [77 Cal.Rptr.3d 96, 2008 DJDAR 7402], reversed a judgment imposing liability

Evaluation of New Civil Jury Instructions:

The Jury Instruction Committee is actively involved in reviewing, and recommending changes to, the new California Civil Jury Instructions. VerdictSearch, a division of American Lawyers Media, is assisting in the solicitation of input and feedback from practicing attorneys who have recently tried cases in California.

If you are interested in reporting on a recent trial in California and providing your feedback on the new CACI jury instructions, click here.

on a corporation for the alleged shareholders debt.

Requiring identifying information is permitted for merchandise returns. Section 1747.08 of the Song-Beverly Credit Card Act of 1971 (*Civ. Code* §§1747 ff.) prohibits merchants from requiring personal identification information be placed on the credit card form when such a card is used for purchases. The statute imposes penalties for violations. The prohibition does not apply to merchandise returns. The statute is subject to the 1-year statute of limitations of *Code Civ. Proc.* §340 ("action upon a statute for a penalty") and not the 3-year statute of *Code Civ. Proc.* §338 ("liability created by statute"). The *TJX Companies, Inc. v. Sup.Ct.* (Caldwell) (Cal. App. Fourth Dist., Div. 3; May 22, 2008) 163 Cal.App.4th 80, [77 Cal.Rptr.3d 114, 2008 DJDAR 7470] (As Mod. June 6, 2008).

Section 170.6 challenge is discovery for punitive damages. *Code Civ. Proc.* §170.6 entitles parties to file one "peremptory challenge" to a judge assigned to hear their cases within specified time limits. But, once the judge makes a determination on contested fact issues relating to the merits of the case, a party may no longer file such a challenge. In *Guardado v. Sup.Ct. (Mariposa Gardens)* (Cal. App. Second Dist., Div. 8; May 22, 2008) 163 Cal.App.4th 91, [77 Cal.Rptr.3d 149, 2008 DJDAR 7529], the court accepted a §170.6 challenge by defendant after it authorized discovery relating to punitive damages (*see, Civ. Code* §3295(c)). The Court of Appeal affirmed. The ruling on the discovery motion did not constitute a determination on contested fact issues relating to the merits of the case.

Court must follow directions of statute. Cal Law Blog reports "[i]t's never fun for a trial judge to be reversed. It's even less fun when the reasons for the reversal, according to the appellate court, "could not be clearer." And it's probably even less fun when the "could not be clearer" directive had been on the books for five years." See, *In re R.D.* (Cal. App. Fourth Dist., Div. 2; June 3, 2008) 163 Cal.App.4th 679, [77 Cal.Rptr.3d 793, 2008 DJDAR 8081].

Insurer sanctioned for failure to attend court ordered mediation. Rule 1 of the Third Appellate District's local rules requires that all persons whose authority to settle must attend court ordered mediation. This includes a representative of an insurance carrier if its consent to a settlement is necessary and, if excess insurance may be involved, it includes representatives of any excess carrier. But, the duty rests upon plaintiff's counsel to notify insurance carriers with potential insurance coverage. If such notice is given and the insurers fail to have a representative with settlement authority present, they are subject to sanctions. *Campagnone v. Enjoyable Pools & Spas Service & Repairs* (Cal. App. Third Dist.; May 30, 2008) 163 Cal.App.4th 566, [77 Cal.Rptr.3d 551, 2008 WL 2222331].

"Prison delivery rule" applies to civil cases. Under the so-called "prison delivery rule," it has long been held that if an incarcerated *pro per* litigant delivers his notice of appeal in a criminal case to prison authorities on or before the deadline, this counts as the filing date, even if it is not filed with the court until later. *Shufelt v. Hall* (Cal. App. Fourth Dist., Div. 1; June 5, 2008) 163 Cal.App.4th 1020; [77 Cal.Rptr.3d 900, 2008 DJDAR 8233], holds that this rule also applies in civil appeals.